

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ROGERS,

Defendant and Appellant.

D069461

(Super. Ct. No. CR111257)

APPEAL from an order of the Superior Court of San Diego County, Kathleen Lewis, Judge. Reversed with directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Rogers appeals from the court order summarily

denying his request to dismiss his felony conviction under Penal Code¹ section 1203.4 after he allegedly successfully completed probation. He argues that the court erred in denying his request. He further argues that, at a minimum, the matter should be remanded for an evidentiary hearing.

The People agree that a defendant moving for relief under section 1203.4, subdivision (a)(1)² is "entitled as a matter of right to its benefits upon a showing that he [or she] 'has fulfilled the conditions of probation for the entire period of probation.' " (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788.) However, because in the instant case neither the prosecution nor the probation department responded to defendant's motion, and because the trial court denied the motion without an evidentiary hearing, the People contend the record is insufficient for this court to dismiss defendant's felony conviction. Instead, the People contend we should remand the matter for an evidentiary hearing. We agree the record is insufficient to dismiss the felony conviction and, thus, remand the matter for hearing.

¹ All further statutory references are to the Penal Code.

² Subdivision (a)(1) of section 1203.4 provides in pertinent part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . , the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted."

BRIEF OVERVIEW AND DISCUSSION

The record shows defendant in February 1990 was charged with one count of child abuse on N.R. (former § 273a)³ and with the allegation of personal infliction of great bodily injury (former § 12022.7)⁴ in case number CR111257. In November 1990, defendant pleaded guilty to count 1 and admitted the truth of the great bodily injury enhancement.

In February 1991, the court placed defendant on nine years' formal probation with the condition he serve 365 days in county jail, after suspending the imposition of his proposed midterm prison sentence of seven years. As part of his probation conditions, defendant was permitted by the court to travel to and reside in Texas under the provisions set forth in the "Interstate Compact."

The record shows defendant, appearing in propria persona, petitioned the court in

³ Former section 273a, subdivision (1) provided: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such a situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years."

⁴ Former section 12022.7 provided in part: "Any person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of three years, unless infliction of great bodily injury is an element of the offense of which he is convicted. [¶] As used in this section, great bodily injury means a significant or substantial physical injury."

September 2015 to dismiss CR111257. Defendant by sworn affidavit in support of the petition stated he had successfully completed the probationary term in 1999, while living in Texas. Defendant further stated he waited to file the petition because he was never advised by counsel he could move under section 1203.4 for dismissal of CR111257.

Section 1203.4 provides a release from the penalties and disabilities of a conviction under enumerated circumstances. (*People v. Seymour* (2015) 239 Cal.App.4th 1418, 1429.) Section 1203.4 does not "expunge" a conviction or render it a nullity; rather, it treats dismissed charges as convictions for some purposes, such as a prior conviction or as impeachment. (*Ibid.*)

"There are three circumstances in which a defendant may apply for relief under Penal Code section 1203.4: if '(a) he [or she] has fulfilled the conditions of his [or her] probation for the entire period; (b) he [or she] has been discharged before the termination of the period of probation; or, (c) in any case in which a court, in its discretion and the interests of justice, determines he [or she] should be granted relief.' " (*People v. Guillen* (2013) 218 Cal.App.4th 975, 991.) As the People in the instant case note, a defendant is entitled to dismissal of the charges against him as a matter of right regarding either of the first two scenarios. (*Ibid*; see also *People v. Chandler, supra*, 203 Cal.App.3d at p. 788 [noting that a "defendant moving under . . . section 1203.4 is entitled as a matter of right to its benefits upon a showing that he [or she] 'has fulfilled the conditions of probation for the entire period of probation' " and further noting that "when a defendant has satisfied the terms of probation, the trial court should have no discretion but to carry out its part of

the bargain with the defendant"].)

Our review of the trial court's order denying the petition involves an interpretation of section 1203.4, subdivision (a). As such, it presents an issue of law for our independent review. (*People v. Seymour, supra*, 239 Cal.App.4th at p. 1428.)

Here, as the People concede, it would appear defendant falls within scenario one, which requires section 1204.3 relief. However, because we conclude the record is insufficient (for the reasons given) for this court to grant such relief, we remand the matter for an evidentiary hearing on defendant's petition.

DISPOSITION

The court's order denying defendant's petition under section 1203.4 is reversed. On remand, the court is to hold an evidentiary hearing and rule on defendant's petition accordingly.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.